

ESTTA Tracking number: **ESTTA581073**

Filing date: **01/10/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91205331
Party	Defendant Kerry Earnhardt, Inc.
Correspondence Address	D BLAINE SANDERS ROBINSON BRADSHAW HINSON PA 101 N TRYON ST, SUITE 1900 CHARLOTTE, NC 28246 0106 UNITED STATES BSanders@RBH.com, MTilley@RBH.com
Submission	Defendant's Notice of Taking Testimony
Filer's Name	Suzanne Warfield
Filer's e-mail	swarfield@rbh.com
Signature	/Suzanne Warfield/
Date	01/10/2014
Attachments	Notice of Agreement of Parties Re Motion to Compel Discovery.pdf(253611 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**TERESA H. EARNHARDT,**

**Opposer,**

**v.**

**KERRY EARNHARDT, INC.,**

**Applicant.**

**Opposition No.: 91205331 (parent)**

**Application Serial No. 85/383,910**

**Trademark: EARNHARDT COLLECTION  
(Intl. Class 20)**

**TERESA H. EARNHARDT,**

**Opposer,**

**v.**

**KERRY EARNHARDT, INC.,**

**Applicant.**

**Opposition No.: 91205338**

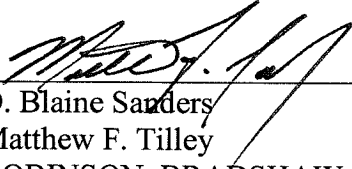
**Application Serial No. 85/391,456**

**Service Mark: EARNHARDT COLLECTION  
(Intl. Class 37)**

**NOTICE OF AGREEMENT OF PARTIES  
REGARDING MOTION TO COMPEL DISCOVERY**

Applicant, Kerry Earnhardt, Inc. ("KEI"), pursuant to 37 C.F.R. § 2.120(e), hereby provides notice that, following KEI's submission of its Reply in Support of its Motion to Dismiss as a Discovery Sanction for Opposer's Failure to Attend Her Deposition and Second Alternative Motion to Compel (the "Motion"), Opposer, Teresa H. Earnhardt, agreed, through counsel, to appear for her deposition on January 17, 2014, at 9:30 a.m. in the offices of Opposer's counsel. A copy of the correspondence containing that agreement and an Amended Notice of Deposition are attached hereto as **Exhibits A** and **B**, respectively. Accordingly, KEI informs the Board that the issues raised in its Motion do not require adjudication at this time.

This 10<sup>th</sup> day of January, 2014.



---

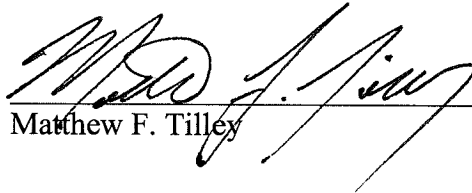
D. Blaine Sanders  
Matthew F. Tilley  
ROBINSON, BRADSHAW & HINSON, P.A.  
101 North Tryon Street, Suite 1900  
Charlotte, North Carolina 28246-1900  
Telephone: (704) 377-2536  
Facsimile: (704) 373-4000  
E-mail: bsanders@rbh.com; mtilley@rbh.com  
***Attorneys for Kerry Earnhardt, Inc.***

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the party listed below by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

Larry C. Jones  
Carla Clements  
Alston & Bird LLP  
101 S. Tryon Street, Suite 4000  
Charlotte, North Carolina 28280-4000

This 10<sup>th</sup> day of January, 2014.

  
Matthew F. Tilley

# EXHIBIT A

## Tilley, Matthew

---

**From:** Jones, Larry <Larry.Jones@alston.com>  
**Sent:** Thursday, January 09, 2014 4:13 PM  
**To:** Sanders, Blaine  
**Cc:** Tilley, Matthew; Clements, Carla  
**Subject:** Deposition of Teresa Earnhardt; Earnhardt v. KEI

Blaine:

Yes, it is fine if, for the record, you want to formally notice the deposition again, specifying that date, time and place.

Additionally, to gain entry to our offices, please provide me with a list of the names of those individuals (including the court reporter and KEI's corporate representative (if any)) who, in addition to you and Matthew, will attend the deposition.

Also, it is my understanding that, pursuant to 37 CFR 2.120(e), you are obligated to inform the Board in writing of Opposer's agreement to appear for her deposition on January 17.

Thank you for your patience and cooperation.

**Larry C. Jones**

Alston & Bird LLP  
101 S. Tryon Street, Suite 4000  
Charlotte, NC 28280-4000  
Direct Phone: (704) 444-1019  
Direct Fax: (704) 444-1759  
Email: [Larry.Jones@Alston.com](mailto:Larry.Jones@Alston.com)

---

**From:** Sanders, Blaine [<mailto:BSanders@rbh.com>]  
**Sent:** Thursday, January 09, 2014 3:34 PM  
**To:** Jones, Larry  
**Cc:** Tilley, Matthew; Clements, Carla  
**Subject:** RE: Deposition of Teresa Earnhardt; Earnhardt v. KEI

Larry,

Friday, January 17, still works for me. Want me to notice it for 9:30 a.m. in your offices?

Thanks for your work on this. Blaine

---

**From:** Jones, Larry [<mailto:Larry.Jones@alston.com>]  
**Sent:** Wednesday, January 08, 2014 3:59 PM  
**To:** Sanders, Blaine

**Cc:** Tilley, Matthew; Clements, Carla  
**Subject:** Deposition of Teresa Earnhardt; Earnhardt v. KEI

Blaine:

I am informed that a date which you suggested, **Friday, January 17**, is a date acceptable to Ms. Earnhardt for her deposition.

Please confirm that this date is still acceptable to you. If not, please suggest some acceptable dates later in January.

**Larry C. Jones**

Alston & Bird LLP  
101 S. Tryon Street, Suite 4000  
Charlotte, NC 28280-4000  
Direct Phone: (704) 444-1019  
Direct Fax: (704) 444-1759  
Email: [Larry.Jones@Alston.com](mailto:Larry.Jones@Alston.com)

---

**From:** Sanders, Blaine [<mailto:BSanders@rbh.com>]  
**Sent:** Friday, January 03, 2014 9:05 AM  
**To:** Jones, Larry  
**Cc:** Tilley, Matthew; Clements, Carla  
**Subject:** RE: Deposition of Teresa Earnhardt; Earnhardt v. KEI

Larry,

Thank you for your continued efforts and Happy New Year. I can't do January 7. I could do January 8, 15, 16 or 17. The next week I could do it any day but MLK Day. Frankly, if Ms. Earnhardt would give me more than two business days' notice, I could do it almost anytime convenient to her.

Please let me know if any of the above dates work or if Ms. Earnhardt is willing to provide other dates. Thanks again.

Blaine

---

**From:** Jones, Larry [<mailto:Larry.Jones@alston.com>]  
**Sent:** Thursday, January 02, 2014 7:54 AM  
**To:** Sanders, Blaine  
**Cc:** Tilley, Matthew; Clements, Carla  
**Subject:** Deposition of Teresa Earnhardt; Earnhardt v. KEI

Blaine:

In response to my inquiries, I am informed that Ms. Earnhardt is available to appear for her deposition next Tuesday, January 7.

Does that date work for you?

If not, I will continue my efforts to obtain from Ms. Earnhardt a list of several dates for your consideration.

**Larry C. Jones**

Alston & Bird LLP  
101 S. Tryon Street, Suite 4000  
Charlotte, NC 28280-4000  
Direct Phone: (704) 444-1019  
Direct Fax: (704) 444-1759  
Email: [Larry.Jones@Alston.com](mailto:Larry.Jones@Alston.com)

---

**From:** Jones, Larry  
**Sent:** Tuesday, November 26, 2013 1:36 PM  
**To:** 'Sanders, Blaine'  
**Cc:** Clements, Carla ([Carla.Clements@alston.com](mailto:Carla.Clements@alston.com)); Tilley, Matthew  
**Subject:** Deposition Notice; Earnhardt v. KEI

Blaine:

In response to your attached letter of November 12 and your notice of the December 5 deposition, we are unable to obtain an agreement from our client to appear for her deposition on December 5, and, at this time, we have no information as to alternative dates on which Ms. Earnhardt can be available for her deposition.

If I am provided such information, I will forward it to you promptly.

**Larry C. Jones**

Alston & Bird LLP  
101 S. Tryon Street, Suite 4000  
Charlotte, NC 28280-4000  
Direct Phone: (704) 444-1019  
Direct Fax: (704) 444-1759  
Email: [Larry.Jones@Alston.com](mailto:Larry.Jones@Alston.com)

---

NOTICE: This e-mail message and all attachments may contain legally privileged and confidential information intended solely for the use of the addressee. If you are not the intended recipient, you are hereby notified that you may not read, copy, distribute or otherwise use this message or its attachments. If you have received this message in error, please notify the sender by email and delete all copies of the message immediately.



# EXHIBIT B

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**TERESA H. EARNHARDT,**

**Opposer,**

**v.**

**KERRY EARNHARDT, INC.,**

**Applicant.**

**Opposition No.: 91205331 (parent)**

**Application Serial No. 85/383,910**

**Trademark: EARNHARDT COLLECTION  
(Intl. Class 20)**

**TERESA H. EARNHARDT,**

**Opposer,**

**v.**

**KERRY EARNHARDT, INC.,**

**Applicant.**

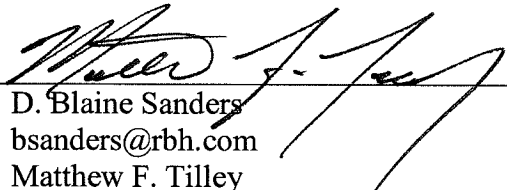
**Opposition No.: 91205338**

**Application Serial No. 85/391,456**

**Service Mark: EARNHARDT COLLECTION  
(Intl. Class 37)**

PLEASE TAKE NOTICE that on January 17, 2014 at 9:30 a.m. and continuing thereafter until completed, at the offices of Alston & Bird, LLP, Bank of America Plaza, 101 S. Tryon Street, Suite 4000, counsel for Applicant Kerry Earnhardt, Inc. will take the deposition upon oral examination of Opposer Teresa H. Earnhardt pursuant to the Rules of the Trademark Trial and Appeal Board, before a Notary Public or an officer authorized to administer oaths. This deposition will be recorded by audio, audio and video, and/or stenographic means for purposes of discovery, for use at trial, and for such other purposes authorized or permitted by the rules.

This 10<sup>th</sup> day of January, 2014.

  
\_\_\_\_\_  
D. Blaine Sanders  
bsanders@rbh.com  
Matthew F. Tilley  
mtilley@rbh.com  
ROBINSON, BRADSHAW & HINSON, P.A.  
101 North Tryon Street, Suite 1900

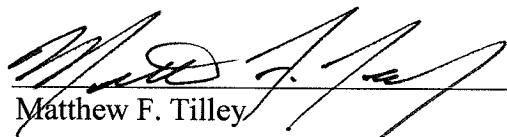
Charlotte, NC 28246-1900  
(704) 377-2536

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing has been served upon each of the parties to this action by depositing same in the United States mail, postage prepaid, in an envelope(s) addressed as follows:

Larry C. Jones  
Carla H. Clements  
Alston & Bird LLP  
Bank of America Plaza  
101 S. Tryon Street, Suite 4000  
Charlotte, NC 28280-4000

This 10<sup>th</sup> day of January 2014.

  
Matthew F. Tilley